IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.435 OF 1996

Mrs.Mini Peter Philips & ors. .. .. Appellants

V/s.

Dina J.S. Fanibanda & ors. .. .. Respondents

Mr.V.Y. Sanglikar with Mr.A.C.Shah i/by Mr.S.G. Vakil for Appellants.

Mr.D.S.Parikh with Mrs.Shella S. Balsari for Respondent Nos.1 and 2.

Mr.R.A. Shaikh for Respondent Nos.3(A) to 3(C).

CORAM : SMT. ROSHAN DALVI, J.

Date of reserving the judgment : 14th June, 2007

Date of pronouncing the judgment: 5th July, 2007

JUDGMENT :

1. This Appeal challenges the judgment and order dated 20.1.1996 of the Bombay City Civil Court in Suit No.3540 of 1979 filed by Respondent Nos.1 and 2,

under which Respondent Nos.1 and 2 were declared entitled to acquire jointly with the Appellants' predecessor-in-title the reversionary right, title and interest of Defendant Nos.3 and 4, the landlords of the building in which the suit premises being flat No.7 on the 3rd floor of Sleater House No.2, Sleater Road, Grant Road, Mumbai 400007 is situate on payment of their half share in the consideration for obtaining the reversionary right, title and interest therein. The landlords were directed to execute all necessary papers and documents for vesting such reversionary right, title and interest in respect of the suit flat in favour of Respondent Nos.1 and 2 herein who were the Plaintiffs in the Suit. Respondent No.1, who was the Plaintiff in the Suit, was declared entitled to get transferred the shares standing in the names of the landlords of the building jointly with the 1st Appellant, who was Defendant No.2 in the Suit.

2. The main lis is between the two sisters who were the daughters of the deceased tenant of the suit premises. One of the sisters, Mehroo, has expired pending the Suit, from which the impugned judgment is challenged. Her heirs and legal representatives have been brought on record in the suit and have thereafter filed this Appeal. They represent her share and hence, they will be referred by her name. One of the sisters, Dina, filed the suit against Mehroo. The two shares of the estate of the original deceased tenant represented by his two daughters shall be referred to by their names as “Dina” (original Plaintiff and the present Respondent No.1) and “Mehroo”, represented by the present Appellants.

3. The father of Mehroo and Dina was the tenant of the suit premises from 1944 until his death in 1954.

4. Upon his death, a Testamentary Petition came to be filed by Mehroo for administration of his estate by the grant of letters of administration in Petition No.350 of

1954. In that Petition, she, as the Petitioner, averred that the deceased died leaving behind him his two daughters i.e. herself and Dina. In Para-5 of the Petition, she averred that she, as the daughter and one of the heirs of the deceased, was entitled to claim an half share of his estate. The schedule of assets annexed to the Petition showed, inter alia, the tenancy rights to the suit premises. Consequently, since 1954 Mehroo claimed half share in the tenancy rights of the flat left by her father.

5. Letters of administration came to be granted by this Court on 16.3.1955, inter alia, in respect of the tenancy rights. Upon such grant, therefore, Mehroo, as one of the heirs of the deceased, came to be entitled to half the share in the tenancy rights and Dina, as the other daughter, came to be entitled to the other half share in the tenancy rights of the suit premises.

6. There were disputes and differences between the two sisters despite the aforesaid grant. There have been a

number of litigations between the two sisters ever since.

7. The first of such litigations was RAD Suit No.500 of 1955 filed by Mehroo, for a declaration that she was a tenant under Section 5(11)(c) of the Bombay Rent Act. This was despite the application for the grant of the Letters of Administration as aforesaid. The suit was filed against Dina, her husband and the landlords of the building in which the said flat was tenanted initially to her father. The suit was dismissed on 14.10.1957 and Mehroo and Dina were held to be joint heirs of the father residing with him at the time of his death and consequently, jointly entitled to share the tenancy.

8. In Appeal therefrom, the said judgment was set aside on 28.1.1960. Mehroo was declared as tenant under Section 5 (11)(c) of the Bombay Rent Act.

9. The Civil Revision Application filed against the said judgment came to be rejected on 10.5.1960.

10. Dina filed a suit in the Bombay City Civil Court being Suit No.2397 of 1960 for declaration of her joint tenancy by an injunction restraining Mehroo from interfering with her rights as a joint tenant and from excluding and obstructing her from the common use and enjoyment of certain portion of the flat used in common by them. The suit came to be decreed in terms of the aforesaid prayers on 11.2.1963.

11. A First Appeal filed therefrom being FA No.164 of 1963 confirmed the decree of joint tenancy but set aside the decree for the other reliefs.

12. A Letters Patent Appeal filed therefrom being LPA No.56 of 1965 culminated in an order passed by consent and agreement of Mehroo and Dina. Under that order, which is relied on by both parties herein, it was declared by Mehroo that Dina and her husband had the exclusive use of the eastern bathroom and W.C. on the north as a sub-tenant since 1947. It was agreed that Mehroo would give Dina bedroom No.3 (out

of the three bedrooms in the suit flat) (which was with an adjoining bath-room and WC in the place of bed-room No.1 which she had earlier occupied with her husband and which had no adjoining bath-room) along with an exclusive portion of the verandah to be partitioned by and between the parties on or before 1.1.1969 on an irrevocable license, subject to the fact that if six months compensation remained unpaid, the license would be revoked and Mehroo would be entitled to possession of the bedroom irrevocably licensed to Dina. It was also agreed between the parties to partition the southern verandah of the flat. Dina was to pay compensation of Rs.15.25 per month for bedroom No.3 to Mehroo, arrears of rent amounting to Rs.291.25 and certain arrears of electrical charges amounting to Rs.168/- for the suit flat. Dina agreed to take a separate meter for the bedroom in her occupation and Mehroo agreed to disconnect the same from her own meter.

13. In consideration of such settlement, Dina agreed to withdraw an administration suit filed by her being Suit No.6440 of 1964 in the Bombay City Civil Court. Further, Dina agreed to bear the cost of electrification to be carried out in the flat and covering of the verandah.

14. The irrevocable license on the aforesaid terms entered into by the parties in the aforesaid LPA is also relied on by both parties.

15. In the meantime, the administration suit, which came to be filed pending the said LPA, was withdrawn on 27.1.1969 by Dina.

16. The landlords decided to convert the building into a Co-operative Society in September 1971. The Society was registered in March 1972. The suit building was conveyed to the Society in June 1972. The tenants were to be members of the Society. Mehroo, as the tenant of the suit flat, entered into an agreement with the Co-operative Society on 28.2.1978 upon the

premise that she is the only person entitled to the suit flat. However, the said agreement was entered into with her by the Society upon she giving an indemnity to the Co-operative Society (Respondent No.4) herein against any claim or demand made by her husband and Dina. Though the Society herein has not contested this Appeal and has agreed to abide by the judgment, it, as the transferor, agreed to transfer the right, title and interest of the suit flat to Mehroo as the transferee in consideration of the transfer price of Rs.25,419.66 paid by Mehroo and recorded her as being in possession of the suit flat as the sole tenant thereof and owning the right, title and interest therein.

17. In Clause-7 of the said agreement, Mehroo declared that she had seen the letters addressed by her sister Dina to the Co-operative Society as also the District Deputy Registrar of the Co-operative Societies, despite which Mehroo declared that she was the only person to be entitled to flat No.7. Nevertheless, she executed the

indemnity indemnifying the landlords as well as the Co-operative Society against all claims that may be made against them by her sister Dina arising out of the transfer of the suit flat upon payment of the aggregate sum of Rs.25,419.66 on 14.2.1978, pursuant to which the agreement came to be entered into by the Society with her on 28.2.1978.

18. Dina filed Suit No.3540 in the Bombay City Civil Court, which came to be decreed and which judgment and decree has been impugned in this First Appeal. Dina sued the Co-operative Society, her sister and the landlords of the building for the relief of declaration and injunctions sought by her. In the suit, Dina has claimed a declaration that she is entitled to acquire the reversionary right, title and interest of the landlords in respect of such flat for the sum of Rs.25,419.66 and in the alternative, she could acquire the reversionary rights jointly with Mehroo, the original 2nd Defendant in the suit, (who died pending the suit) on payment of

Rs.12710/-, which represented her half share therein. She asked for further consequential and ancillary reliefs that the landlords execute the transfer and assignment of the reversionary right, title and interest with her or jointly with her sister. She also claimed a declaration that she was entitled to be a member of the Co-operative Society, and that the Co-operative Society do admit and accept her as their member either exclusively or jointly with her sister Mehroo (and later her heirs and legal representatives who were brought on record).

19. The decree prayed for by her has been granted. The main challenge in the Appeal is that the order in the LPA, which was passed by consent and agreement of the parties, and which had attained finality has been interfered with by virtue of the said judgment and decree.

20. To understand this contention, a reading of the order in the LPA dated 5.11.1968 would become necessary.

21. It is also contended on behalf of Mehroo/Appellants that under the provisions of Section 5 (11)(c), as it stood on the date of the filing of the suit in which the impugned judgment is passed, only Mehroo could be declared a tenant as a family member residing with her deceased father at the time of his death in 1954. With regard to this contention, the provisions contained in Section 5(11)(c) of the Bombay Rent Act (The Act), as interpreted in the various judgments arising therefrom and the applicability of those provisions would have to be considered.

22. It is contended on behalf of Dina/Respondent Nos.1 and 2 that she is a joint tenant/co-tenant with Mehroo ever since her father's death in 1954 and as a member of the family also residing with the deceased at the time of death of the deceased, the tenancy has devolved upon her as much upon Mehroo, as has been held in various judgments under Section 5 (11)(c) of the Act in like circumstances. In fact, it has been

argued on her behalf that she would be entitled as a joint tenant upon Mehroo herself applying for and obtaining the letters of administration to the estate of her deceased father, inter alia, for half share in the tenancy rights along with her sister Dina as reflected in her Petition for Letters of Administration which came to be granted.

23. The determination of this Appeal essentially depends upon the initial admission of Mehroo of her half entitlement to the estate left by her father, including tenancy rights of the suit flat claimed by her as far back as in 1954 in the Testamentary Petition for grant of Letters of Administration and thereafter in the irrevocable license, which she granted her sister for a specified separate independent portion of the suit flat being bedroom No.3 and allowing her to partition the verandah, also putting up coverings in the verandah, if permitted by the landlords and taking a separate electric connection thereto at her cost.

24. Her application for grant of Letters of Administration to the estate of her deceased father and her claim to half the estate, including the tenancy rights of the suit flat is admitted. It would, therefore, follow that she is estopped from contending to the contrary and claiming a full share in the suit flat as a sole tenant and later the sole owner thereof upon purchase of the reversionary rights by herself to the exclusion of her sister from the landlords of the building.

25. Though the impugned judgment has been assailed on many points, Counsel on behalf of Mehroo/Appellants has pressed the aspect on merits relating to the joint tenancy claim of Dina alone. It is contended on their behalf that the order in LPA No.56 of 1965 dated 6.11.1968 has attained finality and the parties are bound by the said order. The judgment in the First Appeal, from which the LPA came to be filed, was merged into the LPA under the doctrine of merger.

26. It is contended on behalf of Dina that the order in the First Appeal has not been set aside. Hence, the order in the First Appeal to the extent that it is not inconsistent with the order in the LPA remains in force. The First Appeal grants Dina the decree of declaration that she is the joint tenant with her sister Mehroo. The Letters Patent Appeal, which is an order passed by consent and agreement of both the sisters, who were parties thereto, grants her the position of an irrevocable licensee. The irrevocable license is granted to a specified separate portion of the suit premises. That consists of bedroom No.3 with an adjoining bathroom and W.C. Aside from that, the verandah in the premises is agreed to be partitioned of and Dina is entitled to separate electrification of her part of the premises at her cost. It must be appreciated that until then Dina lived with her husband in bed-room No.1 under the agreement between the parties, she was allotted bed-room No.3 with an attached bath-room

and W.C.

27. It is a settled law that it is the intention of the parties that determines the nature of the contract between them, no matter what may be the phraseology of their positions under any document. In this case, the agreement is reflected in the order passed by the Court with consent of the parties. The agreement is not of creating a license in respect of the premises admittedly belonging to or owned by one party.

28. It is argued on behalf of Mehroo that Dina became a licensee and that Mehroo was the tenant of the premises. At best, therefore, Dina could claim sub-tenancy since the license was granted on 6.11.1968, as per that order, prior to the amendment of the Bombay Rent Act on 1.2.1973. However, she could not be the joint tenant along with Mehroo and consequently upon the Co-operative Society being formed, Mehroo alone would be entitled to the reversionary rights as the sole tenant of the suit flat from the landlords.

29. Under Section 52 of the Easements Act, a license is a right granted by one party to another in respect of the immovable property of the grantor which in the absence of such a right would be unlawful and which would not amount to an Easement or an interest in the property. For Mehroo to grant a license to Dina, the suit property should have belonged to her. The parties were litigating for decades. Dina had consistently demanded and litigated for her half share in the premises. Mehroo had admitted her half share in the suit premises upon the death of her father in the Petition for letters of administration filed by her. The parties had litigated for declaration of tenancy in the Small Causes Court, Bombay (Rent Court). The parties thereafter litigated for declaration of joint tenancy in the Civil Court. That litigation continued in the First Appeal and thereafter in the LPA itself. There is nothing to show that Dina conceded to Mehroo's right as a sole tenant in the face of her

admission of claiming half share in the tenancy rights upon the death of her father. The license, therefore, could not be granted by Mehroo as the immovable property being the suit flat did not belong to her and was not solely tenanted to her. She, therefore, could not be the grantor as contemplated under Section 52 of the Easements Act, which defines a license.

30. Under Section 60 of the Easements Act, a license becomes irrevocable when it is coupled with a Transfer of Property Act and the transfer is enforced and when the licensee has executed a work of permanent character and incurred expenses in such execution. The license sought to be granted is admittedly an irrevocable license. It must, therefore, be taken to be a license coupled with a transfer of property, that transfer being in force. The intent of the two sisters, therefore, was to transfer of a specified portion of the suit flat being bedroom No.3 with an attached

bathroom and W.C. in the name of Dina, coupled with electrification of that portion at her cost by way of a separate meter and also partitioning of the verandah of the flat. The specific intent of the parties, therefore, was to bring an end to the long standing litigation between them. Dina would be irrevocably licensed a part of the suit flat. It is no one's case that this irrevocable license, or the partition, by whatever name called would not give Dina a specified portion of the flat. She was declared a joint tenant by two Courts below. By an agreement between the parties, the higher Court granted her an irrevocable license to a specified portion of the suit flat. A reading of the entire order, including the fact that she came to be given bed-room No.3 with the adjoining bathroom and W.C. In the place of bed-room No.1 which did not have an adjoining bath-room, along with a portion of the verandah, agreed to be partitioned and the fact of her being allowed to carry out a new electrification work at

her cost by taking a new separate meter, the intent of the parties becomes apparent. That intent is to grant Dina a right in the suit flat – a right which could never be revoked by Mehroo. The only restriction upon the irrevocability of the license was non payment of rent/compensation by Dina. That constitutes a guard upon the tenancy of Mehroo qua the landlord. If Dina, though exclusively entitled to a specific portion of the flat, did not pay/contribute the portion of the rent payable of the flat, Mehroo would have been saddled with the entire responsibility qua the landlord. The payment of rent/compensation by one sister to another, therefore, goes only that far. What must be appreciated is that Mehroo admitted to and claimed a half share in the tenancy rights of her deceased father. Dina and Mehroo admittedly succeeded equally to the tenancy rights of their father. Nevertheless, Dina was not made a joint tenant. This led her to file the declaratory suit in the Civil Court. She obtained the

declaration as well as ancillary reliefs of injunction against interference by Mehroo in her rights and for directions relating to common use and enjoyment of the portion of the flat. In the First Appeal therefrom, she was re-declared a joint tenant, though interference in exercise of her rights in respect of the flat and the directions relating to the common use and enjoyment of the other portion of the flat was not granted. After obtaining the relief of declaration of joint tenancy in the LPA, there is nothing to show that she was required to settle as a mere licensee of her sister. However, at that time, since she was not a joint tenant. The rent receipts would have been made out in the name of Mehroo alone. The only permission that Mehroo could give to her was that of a licensee. She could not make her a tenant of the landlord. She would not get a higher right under those circumstances. She was entitled to equal right as an equal heir of her father though. Under these

circumstances, the only way open to the parties to settle was to grant her an irrevocable license which was, in effect, not a license but, pursuant to it being a specified exclusive share, an equal interest. Hence, instead of being called a joint tenant in respect of the entire flat, she agreed to be an irrevocable licensee in respect of a specified part of the flat. That is how the sisters settled their dispute. That is how they would, in future, get their rights determined amongst themselves as well as with third parties. Under these circumstances, if the landlords formed a Co-operative Society of the tenants, both sisters would be entitled to obtain the reversionary rights with respect to the specified portions of the flat so impliedly partitioned between themselves. Hence, the nomenclature "irrevocable license" does not matter. In any event, it cannot be dwindled to a mere "license", which is otherwise necessarily revocable. The culmination of the rights between the parties by such agreement

under the order of the Court in LPA No.56 of 1965 passed as far back as on 6.11.1968 would govern the relationship of the parties in future transactions thereafter.

31. Consequently, demoting Dina to the position of a mere licensee, which license is necessarily revocable, unless it falls within the provisions of Section 60 (a) and (b) of the Easements Act, could not be contemplated or accepted. Hence, Dina would not continue as a licensee in possession of the suit premises and obtain the colour of sub-tenant entitled to be protected as being in possession on 1.2.1973. It may be mentioned that, in any event, she would be protected as such sub-tenant at-least under that provision.

32. She continued as an irrevocable licensee and her license was never sought to be revoked by Mehroo for another one decade until Mehroo sought to enter into the agreement with the Co-operative Society formed by

the landlords upon the tenants acquiring the reversionary interest therein on consideration.

33. Interestingly, that was sought to be acquired by Mehroo and was allowed to be granted by the Society only upon the execution of the indemnity by her prior to the execution of the agreement indemnifying the Society against all claims made by Dina in respect of the suit flat.

34. The execution of the indemnity itself shows the intent of the parties further. Being well aware of the true intent of the order in LPA allowing Dina irrevocably to a specified portion of the suit flat, neither the Society executed the agreement with Mehroo without claiming indemnity prior to its execution nor Mehroo could enter into such an agreement without giving such indemnity, which she gave a week prior to the execution of the agreement. Mr.Parikh, on behalf of Dina, therefore, rightly claimed that the execution of the indemnity was the ultimate test of the intent as

well as the action of Mehroo. The claim of Mehroo that she was a sole tenant, is, therefore, set at naught by the said indemnity. Even de hors the initial admission of Mehroo claiming half share in the estate of her deceased father including the tenancy rights and the later indemnity offered by her to the Co-operative Society, the order in LPA itself shows the specific division of the flat irrevocably permitting Dina to its exclusive possession and use. This can be in no capacity except in the same capacity that Mehroo claimed, whether or not, she titled it a license, irrevocable that it admittedly was.

35. In the case of **Ram Sarup Gupta vs. Bishun Narain Inter College** reported **in AIR 1987 S.C. 1240,** the licensee of a premises for running a school who made a construction upon the land without any objection raised by the licensor was held to be an irrevocable licensee who could not be evicted. The concept of an irrevocable license is, therefore, quite different from

that of a license. Hence, to contend that Dina was a mere licensee, who continued in the suit premises while Mehroo continued to be the sole tenant, is an over simplification of the intent of the parties. In the case of **Biswanath Panda vs. Gadadhar Panda AIR 1971 Orissa 115**, one destitute brought into the house by his relative and allowed to stay therein, was considered to be only in permissive possession and not having a license coupled with interest which was irrevocable. Drawing from the case of **Thomas vs. Sorrol (1673) Vaughan's Reports 330.1351**, which enunciation has been adopted in Section 52 of the Indian Easements Act, 1882, it was held that a license coupled with a grant became irrevocable and was not a mere license. In Para-14 of the judgment, it is held that to understand the true nature of the relationship between the licensor and the licensee, the decisive consideration is the intention of the parties. In the absence of a formal document, the intention can be

inferred from the surrounding circumstances and the conduct of the parties. That would show a tenancy, or a lease or a mere license. In that case, the mere allowance to the orphan child to remain in the house, of the lessee having no right of transferring his interest in the land, was held to be a mere license, revocable at will. Hence, in view of the specific express contractual incapacity of the lessee, no intention to transfer any interest to the orphan child, so as to make the license irrevocable, was imputed upon him. It was held that the orphan was granted a mere right of residence. In that case though rents were paid by the orphan, rent receipts continued in the name of the lessee. Hence, his possession was held to be merely permissive and without any transfer of interest so as to make it irrevocable.

36. This case is to the contrary. The very creation of an express irrevocable license, therefore, shows the intent

to transfer an interest in the premises, for then alone could it be irrevocable.

37. The contention of the parties with regard to their position under the provisions of Section 5(11)(c) of the Act must be determined in accordance with the precedents.

38. On behalf of Dina, the earliest judgment relied upon is in the case of **Rajaram B. Upadhyaya & ors. vs. Ramraj R. Upadhyaya & ors. 1977 M.L.J. 792,** under which it was held that the superior right of inheritance to the tenancy must yield to the rights under Section 5 (11)(c) relying upon a judgment dated 19.8.1964 of Justice Tulzapurkar, as he then was, in FA No.164 of 1963, (which was between the parties to this litigation itself).

39. This judgment need not detain us long in view of the change in law thereafter in the case of **C.J. Ghadiali & ors. vs. Z.B. Wadiwalla 1981 M.L.J. 876**. The change in the law pursuant to the amendment in 1978 in

Section 5 (11)(c) of the Bombay Rent Act has resulted in an observation that the right of the heir is eclipsed by the provisions of Section 5 (11)(c) in cases where the tenancy continues. Consequently, a member of the tenant's family residing with the deceased tenant at the time of the death of the deceased tenant becomes a tenant. If there is more than one such member, the determination of the tenancy would be, by agreement between the parties, and failing it by an order of the Court. That elementary position in law has been reiterated in a number of subsequent judgments since in the case of **Seeta Shrikrishna Sharma vs. Vijaya A. Rao & anr. reported in 1988 Mah.R.C.J. 480**. In the case of **H.C. Pandey vs. G.C. Paul 1989 M.L.J. 461 (S.C.)**, it has been held by the Apex Court that on the death of the original tenant subject to a statutory provision to the contrary negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant who succeeds to the tenancy as a

joint tenant. In the case of **Anant T. Sabnis vs. Vasant Pratap Pandit 1994 M.L.J. 1450 (S.C.)**, the right of a family member is given precedence over the rights of the heirs of the deceased tenant. This is taken to be the provision to the contrary negativing and limiting the succession upon the death of the original tenant. This provision is contained in Section 5 (11)(c) of the Bombay Rent Act. It is held in that judgment that certain heirs are unable to succeed to such a tenancy and to that extent, a departure is made from the general law of succession. The heirs, who cannot succeed, are the heirs, who are not residing with the tenant at the time of his death. All the family members residing with such tenant at the time of his death, would get precedence over such heirs who would get a right to be a tenant only if any family member of the deceased tenant residing with at the time of his death remained. It is observed in this judgment by the Apex Court that Section 5 (11)(c)

should be construed widely to include the family members of the deceased tenant who would be entitled to the estate either by virtue of a will or by intestate succession.

40. In the case of **Ramchandra Bhikchand Nahar & ors. vs. Narhar Maruti Udavant & ors. 1996 Bom. R.C. 136**, it has been held that though the tenancy rights are heritable, they can be inherited by heirs of the original tenant and not by heirs of the other members of the family who were residing along with the tenant at the time of his death. In this case, the two sisters were the two heirs residing with their father at the time of his death as has been revealed in the evidence of the parties in the earlier litigation, which shall be dealt with presently.

41. In the case of **Ashok Chintaman Juker & ors. vs. Kishore Pandurang Mantri & anr. AIR 2001 S.C. 2251**, it has been held that members of family of the original tenant succeeded to tenancy together.

Consequently, a decree passed against one tenant operated against all the other members of the family covered by the tenancy. It has been observed in Para-11 of that judgment that **"The question that arises for consideration in such cases is whether the tenancy is joint or separate."** It is held that when the tenancy is joint, notice to any one of the tenants is valid and the decree passed in such a suit is binding upon all the tenants. Placing reliance upon the case on **Pandey vs. Paul (supra)**, it is held that tenancy rights devolve on the heirs of the deceased tenant as a single tenancy since there is no division of the premises and the rents payable thereafter. Hence, it is held that the heirs succeed to the tenancy as the joint tenants and consequently, when the suit was filed against one of them by the landlord, the Defendant represented all the tenants.

42. In the case of **Abdul Reheman M. Ashraf vs. Mohamad H. Papamiya 2005 Bom. R.C. 462**, after

the death of the initial tenant the rent receipts were issued in the name of one of the two sons. The son in whose name the rent receipt was issued after his marriage, took up a separate premises. The tenancy continued in his name nonetheless. The other son continued to reside in the premises with his family. The notice of termination of tenancy on the ground of non payment of rent, subletting the premises and acquisition of suitable accommodation was resisted by the son in whose name the rent receipts stood and not by the son who actually resided in the suit premises. That son was recognised to be the tenant of the premises and the other son was never recognized as such tenant for any purpose. It was held that the landlord was entitled to the decree of possession from the son who continued to be the tenant and the other son had to abide the decree.

43. In the case of of **Zahid Ahmedali Mazgaonwalla & anr. vs. Smt.Gulshan Pyarali Mazgaonwalla 2006 (5) M.L.J. 522**, it has been held by this Court that all the family members residing in the suit premises with the tenant at the time of his death became entitled to the statutory right as joint tenants. Consequently, an heir, who was specifically disinherited under a will, was also held to be a joint tenant with other members of his family and transfer of tenancy by another member of the tenant (who was his widow) to her daughter was held bad. It was held that mere rent receipts in the name of the family member will not deprive the other of joint tenancy rights. In this case also, the rent receipts in the name of Mehroo could not deprive Dina of her equal right as joint tenant.

44. It may be mentioned that the records of lower Court in the suit in which the impugned judgment is passed do not show that both Mehroo and Dina did not reside in the suit flat alone at the time of the death of their

father. It is sought to be contended that Dina resided elsewhere and merely visited the premises to meet her father. Counsel have drawn my attention to the evidence led in the earliest litigation in the Small Causes Court Bombay in this regard. No such evidence has been led in the Court below. The evidence in the Small Causes Court suit shows that one room of the suit flat was sublet by the original tenant, the father of Dina and Mehroo, to the husband of Dina. After the marriage of Dina, she moved into her husband's house (which was a part of the suit flat). She continued to use the other part of the suit flat being the hall, kitchen, passages, verandah, etc. It is contended on behalf of Mehroo that, that could be taken to be her visit to the suit flat and not her continuous residence therein. The contention is misconceived. I have been shown the plan of the suit flat. The room sublet to her husband did not have a separate bath and toilet. That arrangement was made

for the first time in the LPA for the use of the bath and toilet adjoining the bedroom granted irrevocably to Dina. Aside from this aspect, both the sisters had no other residence elsewhere. They both, therefore, were the family members residing with their father at the time of his death. They both were equally entitled to joint tenancy rights as per ruling in the case of **Zahid Ahmedali (supra)**.

45. The aforesaid series of judgments culminating in the judgment of this Court in the case of **Zahid Ahmedali (supra)** following the judgments in the case of **Ashok Chintaman Juker (supra)** and **Pandey vs. Paul (supra)**, make it abundantly clear that one family member residing together with another family member would not get a superior right to be a tenant. They both succeed to the tenancy jointly. As per the specific holding in the case of Zahid Ahmedali (supra), one tenant cannot transfer the tenancy to an outsider. It, therefore, follows a matter of corollary that one of these

joint tenants would not be entitled to a preferential right to claim reversionary interest upon the constitution of the Co-operative Society or to be a member of that Society to the exclusion of the other family member as joint tenant.

46. In fact, in this case, the parties having decided to irrevocably use, occupy and possess specified portions of the flat, they would be entitled to those specified portions in the reversionary interest. That being an equal share in the flat, Respondent No.1 claims an equal share in the reversionary interest upon payment of half the consideration.

47. My attention has been drawn to a number of judgments relating to the retrospective operation of a statute rendering a decision of the Supreme Court ineffective by enacting a valid law within the legislative field of the particular legislature. It is claimed that if the statute is expressly or by necessary implication made retrospective, it would apply to litigations filed

earlier. This has been held in the case **of S.S. Bola & ors. vs. B.D. Sardana & ors. AIR 1997 S.C. 3127 relying upon the earlier decision in the case of United Provinces vs. Antiqa Begum AIR 1943 FC 27, Moti Ram vs. Suraj Bhan & ors. AIR 1960 S.C. 655 and K.S. Paripoornan vs. State of Kerala AIR 1995 S.C. 1012.** In view of the fact that the amendment of 1978 to the Bombay Rent Act came into effect before the suit came to be filed in 1979, the retrospectivity aspect becomes purely academic.

48. As the inherent jurisdiction of the Civil Court in the suit filed by one sister against another for the the right of reversionary interest claimed against the Co-operative Society cannot be assailed, the judgments relating to jurisdictional aspect relied upon by Mehroo, assume no significance and need not be considered.

49. The learned Judge has, therefore, correctly considered the aspect of joint tenancy claimed by Dina.

50. The decree in the suit is, therefore, correct. The challenge in this First Appeal cannot be sustained. The Appeal is, therefore, dismissed.

51. There shall be no order as to costs.

52. The Appellants' Advocate applies for stay of this order for 12 weeks. Pursuant to the decree of the Bombay City Civil Court, Respondent No.1 would be entitled to claim her half share in the allotment to be made by the Society in her favour. Respondent No.1 shall not make any application to the Co-operative Society for transfer of any portion of the flat to her name for a period of 4 weeks from today.

(SMT. ROSHAN DALVI, J.)